No. 88-1861

In The
Supreme Court of the United States
October Term, 1988

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR
CLERK

1. JAMES STRYKER and HENRY GROSSKLAGS,

Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,

Respondents,

2. THOMAS LOUGHLIN,

Petitioner,

v.

DAVID EUGENE GERSCH,

Respondent,

3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

REPLY BRIEF TO RESPONDENTS WILLIAM AND LINDA DECKER

THEODORE S. HALABY
Counsel of Record

ROBERT M. LIECHTY
HALABY & MCCREA
1873 South Bellaire Street
Writers V, Suite 1400
Denver, Colorado 80222
Telephone: (303) 691-5300

Counsel for Petitioners

June 21, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

The respondents in *Stryker v. Decker* assert in their brief in opposition that the petition as to their claims is moot because the trial court entered an order dismissing respondents' claims under 42 U.S.C. § 1983 and that the petition is not ripe because the courts below have not ruled on the claims asserted in the Third Amended Complaint. Such is groundless.

First, the instant petition concerns petitioners' entitlement to interlocutory appeal from a denial of immunity as to both federal *and* state claims asserted by respondents. The trial court's order did not address the state tort claims.

As it concerns respondents' § 1983 claims against petitioners, the trial court took the following series of actions:

a. It initially denied petitioners' motion for summary judgment based on their immunity to both the state and federal claims on the grounds there was a dispute as to material fact.

b. Pursuant to a motion for summary judgment by defendants Hodgkin and Summit County Sheriff Department (not parties to the instant petition) filed while the instant matter was on appeal, the trial court inexplicably dismissed the § 1983 claims against petitioners because "no policy or custom" was alleged against petitioners. (*See* respondent Deckers' appendix at 5, ¶ 12)

c. However, the trial court, realizing its error in requiring allegations of custom and policy with respect to

§ 1983 claims against individually named defendants, "considered its own error" in this regard and granted leave to respondents to file a Third Amended Complaint. (*See* respondent Deckers' appendix at 8, ¶¶ 5 and 6)

d. Respondents filed their Third Amended Complaint in which they reasserted the state tort claims and § 1983 claims previously asserted in their Second Amended Complaint, and, in addition, asserted one new § 1983 claim against the entities and two new state tort claims. Respondents do not claim that the alleged facts or claims set forth in the Third Amended Complaint are different from those previously set forth in the Second Amended Complaint.

Respondents are technically correct that their reasserted § 1983 claims contained in their Third Amended Complaint have not been formally ruled upon by the trial court and the Colorado Court of Appeals. However, the record is clear that such claims, as they pertain to these petitioners, are identical to those claims asserted in the Second Amended Complaint that the trial court ultimately refused to dismiss, and which were the subject of the appeal to the Colorado Court of Appeals.

Plainly, the doctrine of mootness is inapplicable to the instant petition. "In general, a case becomes moot ' "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." ' " *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). It is clear that the issue concerning Colorado appellate jurisdiction of an interlocutory appeal from a denial of immunity to claims asserted against petitioners is still "live." The Colorado Court of Appeals refused jurisdiction over

the appeal "for lack of a final, appealable judgment." *See*, Petition, A-2. Thus, the only issue before this Court is whether the Colorado Court of Appeals infringed petitioners' rights by refusing such jurisdiction.

The issue is also ripe under Article III because a "final decision" has been rendered by the district court concerning petitioners' immunity, "notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In the same light, the Court of Appeals has also rendered a final decision concerning the appellate protection of the petitioners' right not to stand trial. Hence, this Court will not become entangled in premature adjudication of whether a state appellate court must take jurisdiction over a denial of immunity because the Colorado Court of Appeals has issued its final word on the subject. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). It would be a futile exercise to reapply to either court below because the same result would issue under the law of the case: the trial court would hold disputed issues of fact preclude a ruling on immunity and the Colorado Court of Appeal would deny jurisdiction "for lack of a final, appellate judgment."

CONCLUSION

For the reasons stated herein, the petition of James Stryker and Henry Grossklags has not been rendered moot and is ripe for consideration of whether the Colorado Court of Appeals erred in not accepting interlocutory jurisdiction over a denial of immunity.

Respectfully submitted,

THEODORE S. HALABY
Counsel of Record

ROBERT M. LIECHTY
HALABY & MCCREA
1873 South Bellaire Street
Writers V, Suite 1400
Denver, Colorado 80222
Telephone: (303) 691-5300